A FRAMEWORK FOR

CAMPUS FREE SPEECH POLICY

Prepared by
Donald A. Downs, George Waldner and Emily Chamlee-Wright
for the Institute for Humane Studies

INSTITUTE FOR HUMANE STUDIES
AT GEORGE MASON UNIVERSITY

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INTRODUCTION: A CALL TO LEADERSHIP

The purpose of this document is to provide higher education leaders with a basic framework to assist them in proactively preparing their campuses to address issues and controversies related to freedom of speech and thought.

In the current climate, characterized by changing expectations about the purpose of higher education, and about the types of interaction—with peers, faculty, and ideas—that students should have on the college campus, it is more important than ever that academic leaders be proactive in creating the environment within which campus stakeholders can productively address challenges related to the exchange of ideas. Too often, campus officials find themselves in the mode of reacting to tense or difficult situations under duress, or without the support of a clear institutional consensus on relevant principles, policies, or practices. In some highly publicized instances, these reactions have diminished the confidence of campus stakeholders or eroded foundational elements of

the institution's mission. In addition to the challenges that have emerged within campus communities, each campus is also obligated to respond to mandates from the government, which, if done without careful consideration, can present academic leaders with critical dilemmas.[1]

This document is intended to encourage and equip deans, provosts, presidents, and other academic administrators to exercise leadership on issues pertaining to free speech and open inquiry on their campuses. In particular, it is offered as an inducement for academic leaders to initiate conversations on their campuses that help build support for the principles, policies, and practices necessary to a vibrant intellectual community—a community that protects the free speech rights of all, while retaining the trust and mutual respect necessary to sustain a culture of open inquiry.

This balance is at risk today, as college campuses are beset by tensions related to higher education's historic commitment to free speech and open inquiry. In a changing intellectual climate, it is increasingly common for faculty, students, and administrators to call for policies or practices like safe spaces, trigger warnings, or free speech zones; to dis-invite or otherwise interfere with certain speakers who have been invited to campus; to occupy administrative offices or place lists of demands upon administrators; or to implement bias reporting systems that are often designed to encourage anonymous reporting of remarks that students or administrators deem offensive.[2] Further, state legislatures can have a corrosive effect on free speech rights and a culture of open inquiry by threatening to withhold funding unless courses deemed inappropriate by political leaders are not removed from the curriculum.[3] One result of this environment is the intentional or unintentional chilling of the open and honest discourse that has been—and we argue should continue to be—the hallmark of a meaningful higher education.

Higher education has periodically faced threats to freedom of thought and expression, though such threats have typically come from outside the academy's gates.[4] What is unusual about today's conflicts is that much of the call for restriction now comes from *internal* sources, including some faculty and administrators, and some students themselves. Recent surveys have shown that a surprisingly high percentage of today's young people arriving on college campuses favor the suppression of speech that they simply find offensive or distressing.[5] And others in the academy seem increasingly likely to close their campuses to ideas deemed offensive or objectionable. To explain these trends, some argue that recent federal educational policies have left students ill-equipped to handle the ambiguity and tensions associated with a robust and rigorous exchange of ideas.[6] Others observe that, within increasingly diverse academic communities at a time of growing discord, it is natural and even necessary for students to seek spaces of comfort as temporary havens from difficult debates.[7]

One need not discount the legitimacy of these concerns to underscore the need for renewed commitment to free speech and open inquiry in higher education. Indeed, in light of these concerns, academic leaders should be all the more mindful of the importance of encouraging free and open discourse on their campuses. If they are to develop the intellectual maturity, increased sense of self-efficacy, and cultural competence we expect of college-educated adults, students need learning environments of free and open inquiry.[8] Further, the world needs institutions of higher learning to serve as models of civil discourse, in which we respond to the myriad differences a pluralistic society presents, not through violence, but through the peaceful exchange of ideas. One cannot expect—indeed, would not wish for—campuses to be devoid of debate, disagreement, even demonstrations. But as a practical matter, campus conflicts or protests that appear to stifle legitimate debate or to silence those who have a credible

claim to be heard can serve to undermine the confidence that institutional stakeholders and the general public have in campus leaders, and in higher education broadly.

It is not realistic or fair to assume that any single college or university academic or administrative leader can shoulder all of the burden of preparing their institution to withstand the challenges that are likely—perhaps inevitable—in today's divided environment. More acutely, it is not realistic or fair for any academic leader or other campus official to end up in a position where he or she is forced to respond to a complicated challenge, under duress, and without benefit of a well-considered and consensus-based set of principles, policies, and practices to fall back upon. Thus, it is critical that campus leaders, with the support of trustees or boards of regents as well as other stakeholders, ensure that such a foundation is established, preferably in advance of serious controversy or discord.

In order to establish this foundation, three factors are critical. First, it is necessary that key stakeholders have a clear understanding (if not total agreement) on the core principles of higher education that are at stake. Second, it is necessary that institutions anticipate and prepare for the kinds of conflict that are likely to arise, giving appropriate attention to the various contexts in higher education within which speech-related controversies are likely to arise. Third, it is necessary that campus leaders are active in establishing the policies and processes, with support from stakeholders, which will guide their judgment and provide principled rationale for defending free speech rights in the face of internal and external pressures to erode them.

This document is designed to provide academic leaders with such a framework within which they can proactively address the kinds

of controversies related to campus speech and expression that are likely to continue. And while this document is written with academic administrators in mind as its primary audience, we recognize that faculty, students, and board members are also often cast in the role of campus leader and will benefit from deeper thinking about the principles of free speech and open inquiry that can guide an institution when faced with challenging situations.

PRINCIPLES OF FREE SPEECH AND INQUIRY IN HIGHER EDUCATION

Higher Education's Obligation to the Ideal of Free Speech

In times where freedom of speech and open inquiry are challenged, it is important to remember that these values constitute cardinal principles of the university, and of a free and open society. In 1915, the American Association of University Professors issued its famous Declaration of Principles, which elevated academic freedom and freedom of inquiry to the status of quintessential obligations of higher education.[9] During the campus turmoil of the 1960s and early 1970s, academic leaders reaffirmed an expansive vision for free speech and open inquiry in higher education through commitments to the ideal of the "Open University." This commitment was made most prominently in the 1974 *Report of the Committee on Free Expression at Yale*, otherwise known as the "Woodward Report."[10] The *Woodward Report* begins with an epigram quoting Justice Holmes' famous statement, "If there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—*not free thought for those who agree with us but freedom for the thought that we hate*."[11] Setting this commitment

to freedom of thought as a societal ideal, the Report points the attention of academic leaders to the role of the university in sustaining that ideal:

> The primary function of a university is to discover and disseminate knowledge by means of research and teaching. To fulfill this function a free interchange of ideas is necessary not only within its walls but with the world beyond as well. It follows that the university must do everything possible to ensure within it the fullest degree of intellectual freedom. The history of intellectual growth and discovery clearly demonstrates the need for unfettered freedom, the right to think the unthinkable, discuss the unmentionable, and challenge the unchallengeable. To curtail free expression strikes twice at intellectual freedom, for whoever deprives another of the right to state unpopular views necessarily also deprives others of the right to listen to those views.[12]

In addition to underscoring this vision for free speech and thought in higher education, the *Woodward Report* reminds us that the Supreme Court and American higher education have played complementary roles in articulating and defending the ideal of free speech. As such, it is advisable for higher education leaders to consider carefully the Court's treatment of free speech. The Court has frequently reinforced Justice Holmes's view that wide-ranging, even confrontational, free speech is essential to the democratic project in America; that the nation must be dedicated to the "principle that debate on public issues should be uninhibited, robust, and wide-open"; and that though "the air may at times seem filled with verbal cacophony [this] is, in this sense not a sign of weakness but of strength."[13] If the "verbal cacophony" of free and open debate is not a sign of weakness but of strength in American civic life, it is all the more important that this robust debate exists on the college campus. Academic leaders have the obligation not to stifle, but to protect, and even to encourage this debate.

At a base level, protection and encouragement of lively campus debate requires an institutional commitment to the ideals of free speech and inquiry espoused by the First Amendment. We are aware that in a strictly

legal sense, First Amendment rights technically apply only to public institutions. But most private colleges and universities have guaranteed their stakeholders rights similar to those protected in the Constitution through contracts and official policies. In addition, relevant Supreme Court cases often express normative understandings of free speech and open inquiry that closely parallel commonly accepted principles of academic rights as understood by both public and private institutions. Accordingly, a prudent reference to the Court's treatment of challenges related to free speech can help illustrate the normative points that comprise the core of a principled approach toward these issues. Finally, as a practical matter, it is unlikely that any single academic institution—particularly if operating under duress—will have more success than the American judicial system has had in balancing the competing interests of those seeking to exercise free speech rights with those seeking protections from certain forms of speech or expression.

Academic leaders can derive at least three core principles from the Supreme Court's treatment of speech issues, which can be applied in a normative sense to all colleges and universities, public or private. First, claims that certain speech is causing discomfort or offense are not sufficient grounds for suppressing speech. Allowing claims of offense to be grounds for censorship opens the door to what is known as the "heckler's veto," which permits those who strongly disagree with a comment or speech to silence it. This would amount, in practice, to a grant of power to one person or group to deprive others of their right to speak, and to deprive the right of others to listen and engage in intellectual exchange.[14]

Second, the Court reminds us that the commitment to free and open inquiry is meaningful only when it is supported in the face of pressure. Anyone can protect free speech in the abstract or when no one is against

it. As Justice Holmes reminded us, the only true test of a commitment to free speech—and the time it matters most—is when threats to speech are in play. Academic leaders must take great care to demonstrate a principled commitment to free speech in times when it is threatened. Without this commitment, higher education leaders will be seen from the outside as acting with political or cynical motives. And if defense of free speech and inquiry does not come from higher education leaders in times of crisis, who *can* be trusted to defend it?

Third, those who call for the suppression of ideas and beliefs often assume that their notions of justice are infallible and incontestable. Such claims ignore that differences of opinion and belief have always characterized human nature and interaction. Furthermore, disagreements over the nature of justice and the proper ordering of society are part and parcel of the very enterprise of political philosophy and theory, which is centered on discussion and debate over the ultimate question: How should we live? The claim that there is only one answer to this question is detrimental to mutual respect and undermines the habits of inquiry and discussion that are necessary to higher education and constitutional citizenship in a liberal and democratic society. And it is uniquely the role of the academy to ensure that this question is always being explored deeply and seriously.

Higher Education's Obligation to Society

It is also important for academic leaders and trustees to remember that the commitments to free speech and open inquiry form the foundation for the special privileges and rights that society has bestowed upon institutions of higher education. Indeed, the "social contract" that higher education has forged with society represents a classic *quid-pro-quo*: higher education receives special financial and policy protections in exchange for providing

society with a good that is distinctive to its mission: the pursuit of truth accompanied by the utmost freedom of speech and inquiry.

With this arrangement between higher education and liberal society, academic leaders and trustees must be aware that colleges and universities place their legitimacy at genuine risk when they fail to live up to their end of the educational "social contract." As a matter of principle, it is important for academic leaders always to remain aware of the societal value of an academy that fearlessly pursues truth through rigorous debate and scholarly challenge. As a practical matter, if institutions of higher learning signal that they are closing themselves off to certain viewpoints, they may raise legitimate concerns that the academy is politicized rather than independent. As more doubts are raised about the independence of the academy, higher education leaders should expect to face increasing levels of scrutiny. In this way, any perceived failure of higher education to remain independent and above partisanship tends to undermine the public's respect and support of higher education.

For better or worse, the response of some institutions to the recent spate of challenges to free speech on campus has created a sense of crisis that has compelled alumni and donors to take increasing notice, as reported in a recent story in the *New York Times*. "A backlash from alumni is an unexpected aftershock of the campus disruptions of the last academic year. Although fund-raisers are still gauging the extent of the effect on philanthropy, some colleges—particularly small, elite liberal arts institutions—have reported a decline in donations, accompanied by a laundry list of complaints."[15] Anecdotally, the authors of this document have spoken with legislators and other authorities whose commitment to higher education has been weakened due to the appearance that free speech and open inquiry on campus are under attack. We have also read

much commentary and interacted with numerous higher education stakeholders and commentators who are (privately) deeply distressed by the present situation. To quote just one observation by a member of the academy that has received much coverage and commentary:

> Things have changed since I started teaching. The vibe is different. I wish there were a less blunt way to put this, but my students sometimes scare me—particularly the liberal ones. Not, like, in a person-by-person sense, but students in general. The student-teacher dynamic has been re-envisioned along a line that's simultaneously consumerist and hyper-protective, giving each and every student the ability to claim Grievous Harm in nearly any circumstance, after any affront, and a teacher's formal ability to respond to these claims is limited at best…[16]

This commentary is only part of a large chorus of concern about American higher education. In addition to questioning such problems as grade inflation, the catering to students' "consumerist" mentality, and the discomforting cost of higher education, citizens are increasingly—and justifiably—raising concerns about the state of free and open inquiry on campuses across the land.[17] Unflattering stories about campus uprisings or protests, or about certain themes in faculty research or teaching are becoming increasingly common; some troublesome critics have responded to these concerns by establishing a faculty watch list.[18] Ultimately, these concerns relate to a broader question about whether Americans trust the leaders of the American higher educational system.

Higher Education's Obligation to Students

Higher education's educational mission is to prepare students to encounter the broad range of ideas and intellectual disputes they will meet as citizens, and to teach students how to think critically and independently with the intellectual tools and skills a university education offers. The commitment to critical thinking extends back to Socrates, who

taught that the unexamined life is not worth living. *Socratic discourse* is related to *civic discourse*, which pertains to the manner and frame of mind in which ideas are shared and debated.

Socratic thinking and civic discourse involve a willingness to listen to others with due respect and to appropriately, respectfully, and seriously question the beliefs and conclusions of others—as well as one's own. They demand being willing to engage in intellectual debate and disagreement in a manner that furthers the discussion rather than retarding it or cutting it off. They call for the ability to handle disagreement while also standing up for one's own positions. To be successful, Socratic engagement involves drawing the right balance between intellectual disagreement and conflict, and due respect for the right of others to disagree. It also requires that one strive to support one's conclusions and beliefs with evidence and logic, for this effort provides the grounds upon which discussion and critical response can take place.

Thus understood, Socratic discourse is closely related to the traditional principle of "civility." As a political concept, civility entails maintaining reason and basic respect in the face of intense intellectual and policy disagreement. It is the quality that allows a community of disagreement to exist. It means dealing with intellectual and value differences on the basis of reason and self-control, not personalization and excessive emotion. The Institute for Civility in Government provides a good definition of civility:

> Civility is about more than just politeness, although politeness is a necessary first step. It is about disagreeing without disrespect, seeking common ground as a starting point for dialogue about differences, listening past one's preconceptions, and teaching others to do the same. Civility is the hard work of staying present even with those with whom we have deep-rooted and fierce disagreements. It is political in the sense that it is a necessary prerequisite for civic action. But it is political, too, in the sense that it is about negotiating interpersonal power such that everyone's voice is heard, and nobody's is ignored.[19]

Though it is difficult to find a college or university mission statement that does not express a commitment to civil and open discourse, consistent practice of these principles appears to be waning. This is certainly due, in part, to the fact that civility and civic discourse are hard. We are not born with these skills and dispositions; rather, they require great effort and commitment at the individual and societal level to inculcate. And while there may be more challenges to the teaching of Socratic and civil discourse today than in previous generations, such challenges do not absolve contemporary academic institutions of their duty to help instill these skills and habits.

In their attempts to foster a culture of open inquiry and the intellectual habits of civil discourse, academic leaders will need to pay careful attention to the ways in which students are oriented into the university experience. Orientation programs *should* be contexts in which an institution conveys to its students its core values (e.g., honesty, integrity, and discipline) and general principles of how members of the community are expected to treat one another (e.g., with mutual respect and dignity). With that said, many orientation programs step well beyond discussion of values and general principles and instead endorse specific beliefs and conclusions that do not *necessarily* follow from those values and general principles, and reject others that could, in principle, be in keeping with the institution's values, sometimes to the point of prohibiting, or singling out for punishment, the articulation of dissenting opinions.[20] Such activities can have the effect of cowing some into silence while encouraging others to be aggressive in seeking out and silencing opinions that are not favored. By contrast, students will be better prepared to respond to controversial and challenging speech in ways that uphold the reciprocal right of all to speak freely if orientation programs focus on activities and literature that stress the truth-seeking mission of higher education, explain how Socratic

and civil discourse constitute necessary components of this mission, and set expectations that feeling uncomfortable in the free exchange of ideas is common and can play an essential part in the learning process.[21]

Intellectual Diversity as a Necessary Part of Diversity in General

As higher education and most college campuses are growing increasingly diverse, it is important to understand and convey the ways in which intellectual diversity is an essential aspect of diversity in general. The commitment to diversity entails tolerating the differences that human beings bring to the table with respect to background and identity. Encountering people who hold ideas different from one's own, and beliefs that clash with one's own, is an inescapable aspect of living in a pluralistic society that values toleration. One simply cannot claim to respect diversity and difference unless one also has due respect for the manifold differences of belief and ideas that prevail in society and the marketplace of ideas. Indeed, respect for intellectual diversity is a *sine qua non* of respect for diversity in general. Hence, to envision intellectual diversity as at odds with diversity in general is a contradiction in terms.[22] The commitment to diversity entails, at a minimum, tolerating the differences that human beings bring to the table in respect to identity and experience, and tolerating the differences that result regarding ideas and beliefs. At its best, this commitment to diversity can result in genuine change and acceptance of difference through persuasion and mutual respect.

Intellectual diversity does not mean that all ideas should be met with equal acceptance, factually or normatively. Indeed, the marketplace of ideas requires critical engagement and disagreement in order for the proper sifting and winnowing to take place. Not all ideas are of equal

credibility. But the right to express all ideas must be respected and protected. Once presented, the process of critical examination takes place.

In a related vein, the idea of intellectual diversity presumes accepting human fallibility, which is an important justification for freedom of speech in its own right. Given ineradicable human fallibility, no one is entitled to claim he or she possesses full truth. Human beings are not perfect, so we naturally have differing viewpoints and beliefs by the very nature of things. Those who claim to possess total truth—and the right, therefore, to silence those who disagree with them—assume a kind of infallibility that is both arrogant and disrespectful of human differences. Such certitude is deeply inconsistent with the very concept of diversity. Academic leaders can gain credibility by espousing this kind of intellectual humility, embodying this humility in their conduct, and ensuring a climate of campus speech that reflects this humility.

CONTEXTS OF FREE SPEECH AND INQUIRY IN HIGHER EDUCATION: ACADEMIC RESEARCH, THE CLASSROOM, THE PUBLIC FORUM, AND THE "APPROPRIATE TIME, PLACE AND MANNER" OF CAMPUS SPEECH

Without a clear view of the principles at stake, higher education leaders will struggle to chart a course through the conflicts and controversies that they and their campuses are bound to encounter. But knowledge of and commitment to fundamental principles is only a starting point. It is also vitally important that academic leaders pay close attention to the specific contexts within which speech-related controversies are likely to emerge in higher education. The cultivation of a campus climate marked by free and open inquiry requires good judgment about the policies and practices that govern these specific contexts.

In addressing the contexts of speech unique to higher education, it is again instructive to consult the jurisprudence of the Supreme Court, beginning with its principles that no context justifies a prohibition on the free exchange of ideas, and that Socratic give and take should be encouraged.

As the Supreme Court declared in the path-breaking case, *Tinker v. Des Moines School District*, the free speech of students must not be limited to the classroom and other limited domains.

> The principal use to which the schools are dedicated is to accommodate students during prescribed hours for the purpose of certain types of activities. Among those activities is personal intercommunication among the students. This is not only an inevitable part of the process of attending school; it is also an important part of the educational process. A student's rights, therefore, do not embrace merely the classroom hours. When he is in the cafeteria, or on the playing field, or on the campus during the authorized hours, he may express his opinions, even on controversial subjects like the conflict in Vietnam, if he does so without "materially and substantially interfer[ing] with the requirements of appropriate discipline in the operation of the school" and without colliding with the rights of others.[23]

Tinker dealt with a secondary school, so its principles apply even more strongly to higher education, *a fortiori.* These principles serve as a useful baseline for addressing particular hard cases that may arise in certain contexts within higher education.

Related to this baseline, one should heed the notion of a "default position" when considering questions of how, or how tightly, to regulate speech. Given higher education's distinctive obligations, and the human fallibility that itself serves as a justification for free speech and inquiry, there should be a strong presumption to resolve difficult questions in favor of freedom of speech or thought. The Supreme Court has often spoken of the need to err on the side of free speech when in doubt, and of the concomitant need for "breathing space." In *New York Times v. Sullivan*, the Court acknowledged that "erroneous statement is inevitable in free debate." Drawing on James Madison's understanding of human fallibility, the Court then wrote: "Some degree of abuse is inseparable from the proper use of everything; and in no instance is this truer than in that of the press." In this particular case, the Court held that certain false statements "must

be protected if the freedoms of expression are to have the 'breathing space' that they 'need… to survive.'"[24] Given this logic, appropriate deference to speakers is a vital part of a commitment to free speech.

Regulating Academic Research

In addressing questions related to academic research, campus leaders and administrators should be highly deferential to the academic freedom of faculty. Generally, research does not constitute a direct harm to anyone unless it engages in libel or other unusual forms of improper individualized harm. Accordingly, research should not be subject to discipline on grounds of misbehavior unless it constitutes fraud, plagiarism, or libel based on standards of law. Nor should the controversial or unwelcome nature of research be, in and of itself, a basis for either discipline or the denial of such rewards as tenure, promotion, raise in pay, or similar reward. Discipline should arise only when clear misbehavior exists. To be sure, discipline can take the form of being denied promotion or a raise, but there is a difference between punishment for misbehavior and lack of reward based on quality of work. Lack of reward should take place only when qualified peers conclude without improper bias that academic research lacks the quality or rigor demanded by the institution. By contrast, some have called for restrictions on research that they deem inconsistent with certain visions of justice. It is important to recognize that accommodating such concerns would lead to the end of freedom of research.[25]

Regulating Classroom Speech

As the Supreme Court declared, "the classroom is peculiarly the 'marketplace of ideas.'"[26] That said, speech by students and instructors

may be restricted in appropriate ways—subject to the provisos we have stressed above. Classroom learning is dedicated to particular subject matters, and students are, in effect, "captive audiences." (An analogous model in constitutional law is what the Supreme Court calls the "Designated or Limited Public Forum," where speech may be limited to certain subjects so long as viewpoint discrimination does not take place.) Consequently, the marketplace of ideas in the classroom countenances limits that do not obtain in many other contexts.

The basic maxim pertaining to the classroom is that all ideas that are broadly germane or relevant to the matter at hand should be protected regardless of how controversial they might be. But teachers' own speech and the speech of students may be limited in order to stick to the subject at hand. According to Robert Post and Matthew Finkin, "A pedagogical intervention bears a 'relation' to a subject under consideration if it is educationally relevant. A pedagogical intervention is educationally relevant if it assists students in better understanding a subject under consideration, either in the sense of acquiring greater cognitive mastery of that subject or in the sense of acquiring a more mature apprehension of the import of that subject, which is to say, an improved ability to experience and appreciate the significance of the subject."[27]

Of course, instructors also must be competent to teach the subject, and they must maintain basic order. The generally accepted principles of academic freedom in the classroom as promulgated by the American Association of University Professors and other organizations maintain that classroom expression may be limited to what is relevant or "germane" to the subject matter. Pontificating at length about political matters, for example, would not be germane to a class dealing with Physics. However, we should not hold to a rigid or narrow view of germaneness for at least

three reasons. First, academic subjects are often related to other subjects. Political dynamics can influence the course of physics research, for example, and discussion of these dynamics may in fact be germane in a physics course. Further, bringing in points or subjects that are tangentially related to the core subject matter can often enhance perspective and intellectual connections, so long as the objective is to enhance the learning at hand. Second, discussing such connections can broaden the mind and serve as a useful pedagogical or heuristic device that makes students more interested and engaged. Knowledge is fluid and adventuresome.[28] Third, having a general definition of "germaneness" does not reduce the need for professional and nuanced judgment on such matters. What counts as effective pedagogical practice resists formulaic prescription.

In the classroom and in other contexts, teachers must not engage in unequal treatment of students, and they must not engage in conduct that is threatening or harassing. In thinking about threats and harassment, it is important to keep certain fundamental principles in mind. First, the basic presentation of ideas and honest opinions, whether inside or outside of class, should never be considered harassment or a threat. One of the greatest threats to intellectual freedom today is the claim that simply expressing or holding certain ideas constitutes harassment or a threat regardless of the context at hand. Any claim that one is threatened by the mere exposure to an unwelcome idea or speaker should be examined with care by campus officials to ensure that speech that merits protection is not prohibited. Doubtful situations should be resolved in the direction of the default principle discussed above.[29]

True threats and harassment are impermissible. A threat is a statement that would make a reasonable person or discrete group of individuals feel that his or her physical safety or lawful conduct is in genuine jeopardy. In 2003,

the Supreme Court rendered a useful definition of what constitutes the kind of threat that transgresses freedom of speech protection. The Court said that true threats arise only from "those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals."

A key aspect of a threat is that it is individualized: it is directed at a specific individual or discrete set of individuals, making them reasonably feel personally threatened. General comments about such things as race, gender, religion, sexual orientation, or the like are seldom considered threats in a legal sense. A speech in the public forum is not usually a threat unless specific individuals are targeted. Posting an intimidating message on someone's dorm door could be considered a threat, depending upon the content. In the latter case, a *privacy* concern might also arise.

Harassment has also become a contested legal concept in recent decades, and dispute surrounds recent definitions offered by the Department of Education. The Supreme Court has provided a definition on which we will draw. As with the notion of a threat, it is important not to let the valid concept of harassment bleed into the mere presentation of ideas and honestly held beliefs. In *Davis v. Monroe County Board of Education*, the Supreme Court defined peer-on-peer harassment in the educational context as conduct that is: "so severe, pervasive, and objectively offensive, and that so undermines and detracts from the victims' educational experience, that the victim-students are effectively denied equal access to an institution's resources and opportunities."[30] One related limit, however, is appropriate, but only if applied with great care. Whereas instructors and students should be free to express all ideas germane to the course broadly understood, the commission of *substantial gratuitous offense*—offense for only its own sake—crosses a line in principle and should be prohibited.[31]

Finally, instructors must avoid *indoctrination*, which entails not allowing the presentation or discussion of counter-views despite the appropriately contested nature of the subject or conclusion at hand. Professors do not have the right to require students to accept a professor's own contested viewpoints. It is important, however, to be clear about what indoctrination is and what it is not—lest complaints of indoctrination serve as a ready excuse to curtail academic freedom.

As an initial matter, it is not indoctrination to teach as fact that which is not intellectually contestable or which has strong support among the leading experts in the field. It is not indoctrination, for example, to teach that the earth revolves around the sun, or that a Holocaust took place at the hands of Hitler. (Of course, there are multiple issues *surrounding* these or other similar topics that could be open to debate, but not the basic facts of the matter.) Teaching these facts is sound instruction. Further, it is not indoctrination when an instructor takes and defends an intellectual position on a contested proposition or theory, so long as this position is held with intellectual honesty, and awareness that it is not the only view, such that students may contest it and still succeed academically in the course.

In its *Freedom in the Classroom* report, the AAUP explained indoctrination as follows:

> Indoctrination occurs whenever an instructor insists that students accept as truth propositions that are in fact professionally contestable. If an instructor advances such propositions dogmatically, without allowing students to challenge their validity or advance alternative understandings, the instructor stands guilty of indoctrination.
>
> Instructors indoctrinate when they teach particular propositions as dogmatically true. It is not indoctrination when, as a result of their research and study, instructors assert to their students that in their view particular propositions are true, even if these propositions are controversial. It is not indoctrination for an economist to say to his students that in his view the creation of markets is the most effective means for promoting growth in underdeveloped nations, or for a biologist to assert her

> belief that evolution occurs through punctuated equilibrium rather than through continuous process."[32]

As the AAUP's definition makes clear, concerns about indoctrination are generally ameliorated when the instructor provides an opportunity for class discussion of, and disagreement with, his or her views, and truthfully answers student queries challenging his or her position. A professor can stake out a position—including a controversial position that offends or insults the sensibilities of his or her students—while also avoiding the shoals of dogma. Still, given that concerns about indoctrination can be sensitive and subjective, it is prudent for the administrator to address any specific charges of indoctrination informally at first, seeking advice from department chairs or other academic colleagues.

Regulating the Public Forum

The provision and protection of a public forum for speakers lies at the heart of the concept of the Open University. As Jose Ortega Gassett wrote in his classic work, *Mission of the University*, "On pain of atrophy, [the University] needs contact…with public life, with historical reality, with the present…It must be in the midst of life, and saturated with it."[33] This logic is thoroughly consistent with the *Woodward Report*. The principles of intellectual diversity and the Open University require that a wide range of viewpoints should be not only allowed on campus, but also encouraged. These principles do not oblige an institution to provide a forum for views that have no academic credibility. Further, in practice, limits on resources, space, and time mean that no campus can provide a platform for every speaker or viewpoint. Within these limits, though, it is advisable for administrators to take seriously their role as curators of a public forum on their campus in ways that broaden and strengthen the intellectual lives of the campus community.

An important dimension of this curatorial role for campus leaders is to ensure that freedom of speech is seen as a system of reciprocal rights and duties.[34] Speakers, audiences, and the institution have rights pertaining to the expression of their voices, and they have the duty not to violate the rights of others and to maintain the basic order within which views and counterviews may be expressed. The institution has the primary duty of protecting the operation and integrity of this system. An important part of protecting the integrity of this system is ensuring that no campus stakeholder or group of stakeholders has the power to close a campus public forum to viewpoints with which they disagree. Whether the cloture of the public forum occurs through the speaker selection process, through dis-invitations, or through disruptions, all of these can represent the abuse of the system of reciprocal rights and duties that is the bedrock of free speech.

Academic leaders should be both assertive and inclusive in exercising their curatorial discretion over the campus public forum, doing their best to respect the varied viewpoints of the campus and community, and to broaden and deepen the intellectual life of the community. Further, leaders should establish clear policies and guidelines for those campus stakeholders who have authority to invite speakers to campus, particularly to avoid the problem of speaker dis-invitations. The dis-invitation of speakers is troublesome because it raises the specter that the institution is actively censoring certain viewpoints or weakly giving into pressure.[35] In addition to betraying a core commitment to the ideal of the Open University, the signals sent by a dis-invitation serve to erode the credibility of the institution, and of higher education, in the minds of the general public.

If and when a campus hosts a speaker with whom some on campus disagree, the administrator's challenge is to recognize that limited

counter-speech and protest is protected speech, while simultaneously doing what he or she can to ensure that protest does not bleed into disruption of the free exchange of ideas. If actual disruption takes place—e.g., when the speaker is unable to speak or finish his or her speech, or the speech is not allowed to proceed in an orderly fashion—three dimensions of rights have been violated: the rights of the speaker, the rights of listeners, and the rights of the Open University as a community of learners.[36] Heckler's vetoes violate the basic principles of the Open University. The university would be warranted in removing those who are disrupting the speech. Perhaps more importantly, academic leaders should be aware of and prepared to take advantage of their opportunity to use any such disruptions as teachable moments. When disruption looms, for example, an academic leader may take the floor to remind the audience of the university's commitment to, and the audience's responsibility to respect, the free exchange of ideas.

The example above raises an important caveat about the responsibilities speakers have if they are to retain their rights as speakers. A speaker who treats his or her audience disrespectfully, by, for example, hurling insults when a counterargument is offered, has not upheld the rules of the discursive game. Audience members who respond to such speech with jeers, guffaws, and vocal admonitions are, arguably, within their right. But a teachable moment presents itself here as well. An academic leader may see fit, for example, to remind a speaker of the discursive values he or she is expected to uphold in the free exchange of ideas. (And it helps if the academic leader has readied him or herself to convey such a message well before it is needed in the heat of the moment.)

As a practical matter, a commitment to the principle of free speech must allow for the airing of viewpoints that some in the community find

disagreeable or incorrect. In responding to this fact, Justice Louis Brandeis wrote, "If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence."[37] Academic leaders are advised to heed this logic, and to publicly and frequently advocate for free speech based on this logic, which holds that it is preferable to oppose false or misguided speech by way of more speech rather than by force. Thus, if someone on campus says something that many find objectionable, but that nonetheless merits protection, there is nothing wrong with the administration making a public statement to demonstrate its disagreement, so long as such a statement does not serve to chill discourse or the marketplace of ideas, and so long as such a statement does not imply or state that no one is entitled to say such a thing. As the Supreme Court has held in the doctrinal area of "Government Speech," the government possesses its own free speech right to express its views. So do institutions of higher learning. Being able to express an institutional position in an appropriate manner is one way of responding to the expression of unpopular or disturbing—but protected—speech on campus.

The best way to deal with the concerns raised by provocative speech is for the institution to lay the *a priori* groundwork for an open marketplace by making it clear to all concerned that the institution is dedicated to protecting all viewpoints, and that views expressed in the marketplace or public forum are not the views of the institution *per se*. Likewise, academic leaders should ensure that student groups are treated equitably with regard to their access to the institution's public forum. Some student groups will naturally harbor or sponsor ideas that go against the grain of campus consensus. So long as such groups do not engage in actual conduct that is contrary to valid university rules, the institution is obligated by basic free speech principles to treat all groups equally

regardless of their beliefs. It is only when groups engage in actual conduct in violation of valid rules that sanctions or differential treatment is acceptable. A similar standard should apply to funding of student groups, as well.[38] The Supreme Court has envisioned campus forums of student groups as similar in nature to public forums in which viewpoint neutrality is a fundamental obligation.

Regulating Appropriate Time, Place, and Manner of Campus Speech

Regulations on the appropriate time, place, and manner of speech are not only permissible, but important for preserving the integrity of the marketplace of ideas. Examples include limiting the level of noise near classrooms and libraries; requiring advance notice of events in which police might be needed to maintain order—though this requirement must be applied in an even-handed manner consistent with viewpoint neutrality, and not as a pretext for chilling or discouraging speech; limiting speech to the purposes of a limited public forum; limiting the hours of operation for public speech purposes so long as the hours allowed clearly accommodate the mission of the Open University. The basic idea is that reasonable measures to protect order and the rights of all concerned are allowed and even necessary, but three fundamental rules apply to their application. First, they must be applied in an even-handed manner regardless of the viewpoints or content of the speech. Second, they must not serve as pretexts for discriminating against speech. Third, they must not limit speech more than is necessary to achieve the legitimate purpose of order and protecting the rights of others.

Appropriate time, place, and manner regulations should not permit free speech zones that limit student speech or demonstration to a certain narrow area of campus, or that require students to obtain prior approval

before engaging in public speech or assembly. The limit of public discourse to such zones has at least two problems: it implies that free speech is the exception, not the default rule, and should be sufficiently quarantined, and it restricts the availability and quantity of free speech on campus. Allowing public discourse only in "Hyde Parks" is contrary to basic free speech doctrine, principle, and experience; recall the quotation from *Tinker* above regarding the need for free speech and inquiry to exist in all domains of an educational institution. In any event, speech in the public forum—as elsewhere—may be restricted if it constitutes a realistic direct threat to specific individuals, or if it amounts to a direct incitement to imminent lawless action that is likely to occur.[39]

ENGAGING WITH CAMPUS STAKEHOLDERS ON FREE SPEECH AND OPEN INQUIRY

A central premise of this document is that issues relating to free speech and inquiry on today's college campus are simply too complex for any single institutional leader or group of leaders to address alone. More fundamentally, the principle and logic of free speech make it inadvisable for any single leader or group of leaders even to attempt this, as this would exclude important perspectives from the conversation, and would deprive some in the community of the opportunity to find and share their respective voices. It is important, then, that an institution's leaders identify and engage a broad and representative group of campus stakeholders in conversations about the campus climate on free speech. It is essential that leading administrators find common ground and establish alliances with those key stakeholders or groups of stakeholders who share a commitment to free speech and open inquiry—on any ground whatsoever. Making an institutional commitment to freedom of speech can provide an opportunity to build trust and goodwill with stakeholders, and enhance the institution's reputation on and off campus.

As a starting point for structuring a conversation with stakeholders about how to address tensions related to free speech on campus, it is recommended that academic leaders—including administrative leaders, faculty senates, trustees, even students—consider and deliberate about ways in which other institutions of higher education have addressed these tensions. Perhaps the simplest way of doing this is to encourage stakeholders to review and discuss the report issued by the University of Chicago Committee on Freedom of Expression, released in January 2015. The report proclaims, citing the University's former president Robert M. Hutchins, that "our students… should have freedom to discuss any problem that presents itself," and that the remedy for ideas that the university community opposes should come "through open discussion rather than inhibition." The Chicago Committee on Freedom of Expression recommits itself to this vision, stating, "Because the University is committed to free and open inquiry in all matters, it guarantees all members of the University community the broadest possible latitude to speak, write, listen, challenge and learn. Except insofar as limitations on that freedom are necessary to the functioning of the University, the University of Chicago fully respects and supports the freedom of all students, faculty and staff 'to discuss any problem that presents itself,' free of interference."

Admirably balancing principle and prudence, the Report continues, "This is not to say that this freedom is absolute," and details the University's commitment to protecting against speech that "violates the law, is threatening, harassing, or defamatory, or invades substantial privacy or confidentiality interests. Moreover, the University may reasonably regulate the time, place and manner of expression to ensure that it does not disrupt the ordinary activities of the University."[40] In the broadest manner, the University of Chicago's Committee on Free Expression provides a starting point for every institution seeking to address tensions

related to free speech in higher education. Though different campuses will necessarily arrive at their own consensuses, academic leaders would be on solid ground in asking key groups of stakeholders to review and discuss the statement by the Chicago Committee on Free Expression.[41]

Faculty

The primary group of stakeholders for academic leaders to engage in discussions about their campus climate on free speech is faculty. In any institution that is committed in a principled way to the free and open exchange of ideas, this commitment will be made manifest on a daily basis by faculty through their active exercise of academic freedom in research, teaching, and rigorous scholarly debate. Though this debate may at times put faculty at odds with one another intellectually, and though there are natural institutional rivalries between faculty and administrators, an institution's academic leaders can help to bridge these gaps by respecting the role faculty play as intellectual leaders within the academy and placing on them real responsibilities for helping address campus concerns relating to free speech.

Faculty will most naturally be concerned with real or perceived limits to their own speech or academic freedom. Given this, academic leaders must be circumspect with regard to their own past interactions with faculty touching on these issues. If there have been instances where the rights or privileges of faculty have been denied or questioned, it is critical that administrators review those actions in light of a broader reconsideration of the institution's commitment to free speech and open inquiry. Without this earnest reconsideration—and any related effort to remediate harms done—faculty will have reason to question the sincerity of any apparent effort to engage them on issues of the campus climate on free speech.

It is likewise important that campus administrators grant appropriate deference to judgments of well-respected faculty in any instances where concerns related to academic freedom, or speech rights more broadly, arise. One possible model for faculty to follow is that of the Committee for Academic Freedom and Rights at the University of Wisconsin, an independent, non-partisan, and interdisciplinary group of faculty who consult with faculty (as well as staff, students, student groups, and campus newspapers) who believe their rights or privileges have been violated. The faculty who make up CAFAR understand the laws, policies, and processes that govern the institution, as well as the intellectual principles and norms of the academy. As such, they are in a position to advise faculty, students, or staff who are encountering limits to their rights or privileges for the first time.[42] Though such a group, operating independently of campus administrators, may seem threatening to the institution's authority, it is critical to recognize that the institution's authority is actually enhanced insofar as its leaders demonstrate a preference for due process over simple expediency, and for the considered judgment of key stakeholders over a reflexive defense of campus officials.

A faculty group of this kind can also serve as a resource when it comes to consulting on institutional policies that impact free speech and open inquiry, providing both substantive input and the signal that faculty viewpoints have been considered. In any event, administrators should not permit the adoption or implementation of policies that touch on academic freedom or the free speech rights of faculty or students without the consent of key groups of faculty. This is particularly the case as campus bureaucracies are seeing rapid growth.[43] Regardless of debates about the nature or character of the growth of campus bureaucracies, it is important that the institution's leaders ensure that this growth does not dilute the influence or authority of faculty, and that faculty see campus leaders as

partners in maintaining faculty intellectual leadership in light of growth in campus bureaucracy.

In terms of overseeing the uses of the campus as a public forum, administrative leaders should ensure that well-respected faculty from a range of disciplines and backgrounds are involved in decisions related to prominent invitations of outside speakers to campus. Though student leaders may be involved in some decisions, including those related to selection of commencement speakers, it is important that faculty be accorded the respect they deserve with regard to the intellectual life and tone of the campus—so long as academic leaders ensure the institution's commitment to curating the range of campus discussion that will appropriately engage and challenge all students. With this said, it is essential that once the institution extends an invitation, the invited speaker is granted the opportunity to speak, and that faculty involved in the invitation process are engaged in any response that may be necessary to campus protests.

Governing Boards and Trustees

As a matter of good governance, it is prudent and important to involve governing boards in conversations about sustaining a campus climate that is welcoming to a wide range of ideas and viewpoints. The Association of Governing Boards' recent *Statement on Governing Board Accountability for Campus Climate, Inclusion, and Civility* recommends a robust interaction between campus leaders and governing boards on these issues, stating, "Boards should periodically review campus climate policies and ensure those policies are up-to-date and consistent with institutional mission and relevant laws and regulations." AGB also recommends that "governing boards should be proactive to ensure that institutional or system policies

that clearly articulate principles of diversity and inclusion, free and open discourse, academic freedom, and personal safety are developed, updated and followed."[44]

Because issues related to campus climate can be sensitive, and can touch upon questions of academic freedom or related issues about which trustees may feel deferential, it is essential that campus leaders, where appropriate, actively seek advice and oversight from board members, as well as guide the board so that members have a firm grasp of foundational principles of free speech and open inquiry. It is the governing board's fiduciary duty to ensure the institution's compliance with relevant laws and regulations, to ensure its prudent management of risk and reputation, and to ensure its financial health. Each of these can be threatened as a result of ill-considered policies or procedures related to conflicts surrounding campus speech. At public institutions, which are obligated to protect rights of speech and expression guaranteed by the First Amendment, governing boards have a particular duty to ensure that relevant institutional policies and practices are regularly and carefully reviewed so as to avoid any risks related to non-compliance with relevant laws and regulations. At private institutions, board members may also be obliged to ensure fidelity to specific institutional missions, histories, and traditions, while also weighing questions of how to address cultural, political, or social changes that challenge the institution's mission.[45] In either case, boards must be aware of policies and practices that limit the range of free speech or of speakers that are permitted on campus, perhaps even commissioning surveys about campus climate, so as to ensure that these decisions have been made with a full view of their implications.

Not only do boards have responsibility for ensuring the health and good governance of an institution, they also represent groups of

stakeholders—including alumni, donors, and leaders of communities surrounding the campus—who are not regularly present on campuses, but who have opinions that should be considered when it comes to the institution's culture and reputation. From their perspective as friends and supporters who appreciate the campus from the outside, board members can help counsel prudence in the face of intense pressure on campuses. Because the majority of students—and indeed, most faculty—do not speak out either way, it is easy to mistake the most vociferous voices for the most numerous ones. If an institution responds in haste to the loudest voices, it runs the risk of overlooking the views of campus constituents who are less vocal. A "tyranny of the minority" could prevail, which is detrimental to the mission of the university and its obligation to protect the rights of all stakeholders.

None of the above is intended to discount the claims of small, impassioned groups; rather it is to ensure that campus leaders have the appropriate advice and support to act prudently in times of campus crisis. This is especially the case in circumstances where student groups present administrations with lists of significant demands. Students presenting the administration with demands may have legitimate claims, but it may be beyond the administration's legitimate power to comply with these demands without engaging other stakeholders. Even if certain demands are within the administration's power to address, doing so may cause resentment on the part of other campus constituents, and it may signal that the administration is merely reacting to pressure rather than actively leading the institution. Campus leaders are well advised to engage boards in response to student demands or other crises. It is prudent also for leaders, with the oversight or approval of their governing board, to develop contingency plans for addressing campus crises before they occur. In this way, campus administrators can be at least partially protected from the danger of making ill-considered decisions under duress.

Students

The final key group of stakeholders when it comes to questions relating to free speech and inquiry on the college campus is students. As mentioned previously, many students arrive on college campuses with only a partial understanding of the intellectual challenges of the college experience. It is up to campus leaders and faculty to ensure that students are treated with intellectual respect and dignity, while also realizing the institution's obligation to educate students, which often requires students to encounter challenge and intellectual discomfort. Thus, it is essential that academic leaders take steps to set students' educational expectations when they arrive on campus that respectful challenge, cognitive tension, and intellectual discomfort will occur and recur throughout their college experience.

Psychologists have discovered that individuals' perspectives and assumptions about things are affected by the thoughts and feelings to which they are exposed before they encounter those things—by how they are "primed."[46] It is reasonable to assume that students will feel less threatened by controversial and challenging speech if they are "primed" to do so at the beginning of their college experiences. We recommend presenting incoming students with sessions and literature that stresses the truth-seeking mission of higher education and how wide-open discourse and intellectual challenge constitute necessary components of this mission. Of course, it is imperative that such sessions be staffed by individuals who are truly committed to the principles of free speech and open inquiry, and that the literature reflect this commitment. Such sessions and literature should also discuss proper limits and the elements of vibrant yet civil discourse as an ideal.

It is important that this institutional commitment to the earnest and civil exchange of ideas extends to the experience of students in the

classroom. Faculty are clearly central in overseeing the classroom experience. Institutional and departmental leaders should clearly engage faculty in setting certain expectations about the classroom experience on their campus. These expectations should include the assurance that the classroom is a place for ideas to be tested and challenged; that it is a place where faculty present the latest research and research questions—including normative, ethical, or political implications—in a way that carefully separates academic research from personal opinions; and that it is a place where each student is treated with respect by faculty and classmates, even if they raise challenging questions in the spirit of honest inquiry. Student perceptions of the depth of their institution's commitment to freedom of speech and inquiry will be shaped most directly by their classroom experiences.

Administrators should also engage students in practical questions related to the freedom of speech and inquiry on campus through thoughtful interactions with student groups. This includes demonstrating equal and even-handed treatment of student groups, regardless of political, religious, or other beliefs. Institutional policies related to the formation of groups, their formal recognition by the administration, and their access to institutional resources or space, should be crafted and applied in ways that do not privilege or disadvantage any particular group. Further, administrations should ensure that student groups have the freedom to organize and conduct their own events, including events that raise ideas or engage speakers unpopular with others on campus. Administrators should be cautious about policies or actions that appear to single out certain groups or points of view for special privileges or special scrutiny, and they should go to great lengths to ensure that student group leaders understand and respect the distinction between legitimate protest and the illegitimate heckler's veto.

Academic leaders may seek opportunities to engage student groups or student government associations in more formal ways. In any systematic campus-wide review of policies related to freedom of speech, academic leaders should actively solicit input and engagement from student representatives—remembering, of course, that these interactions with students are simultaneously an opportunity for administrators to learn from students and to ensure that students are appropriately wrestling with the challenges of understanding free speech as a system of reciprocal rights and duties. Likewise, administrators in times of campus crisis must demonstrate respect and sensitivity for aggrieved students, as they take care to demonstrate that their response to any campus crisis is grounded in a firm commitment to the principles of free speech, toleration of differing viewpoints, and mutual respect. In this way, campus crises can be made to serve the purpose of building trust and strengthening campus culture.

CONCLUSION

There is no single or simple way to inoculate a campus against controversy resulting from the clashing of ideas. Indeed, a central premise of this document is that it would be shortsighted to attempt this, as inoculating a campus against a clash of ideas would undermine the very purpose of higher education in a liberal democratic society. Instead, it is hoped that academic leaders understand and embrace the role they play on their campuses, and in a free society, of defending the ideal of a free and open exchange of ideas. By initiating conversations among a wide range of campus stakeholders about the ideals of free speech and the open exchange of ideas, and about how to ensure a robust and respectful exchange of ideas, academic leaders can take the first and biggest step toward strengthening the culture of their campus. More importantly, we hope academic leaders take pride in their respective campuses as places where a "verbal cacophony" is heard and seen as a sign of the strength and vibrancy of their campus community, and as a sign of hope for American civic life.

NOTES

1. In the wake of federal pressures on colleges and universities to weaken institutional rules governing due process, for example, college students have successfully sued their colleges for violations of due process. See Jake New, "Out of Balance," *Inside Higher Education*, April 14, 2016. https://www.insidehighered.com/news/2016/04/14/several-students-win-recent-lawsuits-against-colleges-punished-them-sexual-assault.

2. Jeffrey Aaron Snyder and Amna Khalid, "The Rise of 'Bias Report Teams' on Campus: Colleges across America are creating shadowy groups to handle complaints. Will they end up muzzling students instead?" *The New Republic*, March 30, 2016. https://newrepublic.com/article/132195/rise-bias-response-teams-campus.

3. Joe Cohn, "Wisconsin Lawmakers Once Again Threaten Academic Freedom," FIRE, December 21, 2016. https://www.thefire.org/wisconsin-lawmakers-once-again-threaten-academic-freedom/.

4. Neil Hamilton, *Zealotry and Academic Freedom: A Legal and Historical Perspective* (Transaction Books, 1995).

5. Jacob Poushter, "40% of Millennials OK with limiting speech offensive to minorities," Pew Research Center, November 20, 2015. http://www.pewresearch.org/fact-tank/2015/11/20/40-of-millennials-ok-with-limiting-speech-offensive-to-minorities/.

6. Ryan Kelty and Bridget A. Bunten (Eds.), *Risk-Taking in Higher Education: The Importance of Negotiating Intellectual Challenge in the College Classroom* (Rowman & Littlefield, 2017).

7. Morton Schapiro, "I'm Northwestern's president. Here's why safe spaces for students are important." *Washington Post*, January 15, 2016. https://www.washingtonpost.com/opinions/how-to-create-inclusive-campus-communities-first-create-safe-places/2016/01/15/.

8. Greg Lukianoff and Jonathan Haidt, "The Coddling of the American Mind," *Atlantic Monthly*, September 2015. http://www.theatlantic.com/magazine/archive/2015/09/the-coddling-of-the-american-mind/399356/. See also Jonathan Haidt, *The Righteous Mind: Why Good People Are Divided by Politics and Religion (Vintage Books*, 2013).

9. *AAUP's 1915 Declaration of Principles:* https://aaup.org.uiowa.edu/sites/aaup.org.uiowa.edu/files/Gen_Dec_Princ.pdf The AAUP has followed this foundational declaration with updated statements of principles that build upon the 1915 statement.

10. The full committee report is at: http://yalecollege.yale.edu/deans-office/policies-reports/report-committee-freedom-expression-yale#Report%20of%20the%20Committee The committee chairman's "Letter to the President" is at: http://yalecollege.yale.edu/deans-office/policies-reports/report-committee-freedom-expression-yale.

11. Holmes, dissenting opinion in *U.S. v. Schwimmer*, 279 U.S. 644 (1929), at 655. Emphasis added.

12. *Woodward Report*, Section I, "Of Values and Priorities."

13. *New York Times v. Sullivan*, 376 U.S. 254 (1964); *Cohen v. California*, 403 U.S. 15 (1971), at 25.

14. On the heckler's veto, see Harry Kalven, Jr., *A Worthy Tradition: Freedom of Speech in America* (Harper and Row, 1988), 89-91. On how claims of the offensiveness of speech do not present grounds for restricting free speech, see Jonathan Rauch, *Kindly Inquisitors: The New Attacks on Free Thought* (University of Chicago Press, 1993).

15. "College Students Protest, Alumni Fondness Fades and Checks Shrink," *New York Times*, August 4, 2016. http://www.nytimes.com/2016/08/05/us/college-protests-alumni-donations.html?ref=todayspaper&_r=1 .

16. Edward Schlosser, "I'm a Liberal and My Liberal Students Terrify Me." VOX, June 3, 2015. http://www.vox.com/2015/6/3/8706323/college-professor-afraid

17. See, e.g., Donald Alexander Downs, *Restoring Free Speech and Liberty on Campus* (Cambridge University Press, 2006); Greg Lukianoff, *Unlearning Liberty: Campus Censorship and the Unlearning of American Debate* (Encounter Books, 2014).

18. Colleen Flaherty, "Being Watched." *Inside Higher Education*, November 22, 2016. https://www.insidehighered.com/news/2016/11/22/new-website-seeks-register-professors-accused-liberal-bias-and-anti-american-values.

19. Institute for Civility, "What Is Civility?" http://www.instituteforcivility.org/who-we-are/what-is-civility/ .

20. Alan Charles Kors, "Thought Reform 101" *Reason* (March, 2000). http://reason.com/archives/2000/03/01/thought-reform-101/.

21. Donald Downs wrote a *Handbook for Civic Discourse on Campus* for the University of Wisconsin-Madison that is being used in orientation for new students and in other contexts at the University in the fall of 2016. This is available on request.

22. Jonathan Rauch, *Kindly Inquisitors* (University of Chicago Press, 1993).

23. *Tinker v. Des Moines School District*, 393 U.S. 503 (1968).

24. *New York Times v. Sullivan*, 376 U.S. 254 (1964), 271-2, 280.

25. See, for example, Sandra Y. L. Korn, "The Doctrine of Academic Freedom: Let's Give Up Academic Freedom in Favor of Justice," *Harvard Crimson*, February 18, 2014, who clearly acknowledges that a policy favoring "academic justice" will limit protections for academic freedom. http://www.thecrimson.com/column/the-red-line/article/2014/2/18/academic-freedom-justice/.

26. *Keyishian v. Board of Regents*, 385 U.S. 589 (1967), 603.

27. Matthew W. Finkin and Robert C. Post, *For the Common Good: Principles of Academic Freedom* (Yale University Press, 2009), 92. Conrad Russell, *Academic Freedom* (Routledge, 1993). Post and Finkin are former heads of the AAUP's Committee A, the Academic Freedom Committee. See also AAUP, "Freedom in the Classroom," 2007. *AAUP Policy Statements and Reports*.

28. Finkin and Post, *For the Common Good*, 82-94.

29. *Virginia v. Black*, 538 U.S. 343 (2003).

30. *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999), at 652.

31. An example of gratuitous offense that one of us dealt with years ago involved a teaching assistant who mocked the religion of a woman student who wore a necklace with a Catholic cross to class. He did so repeatedly and with absolutely no relation to the subject matter of the class. Accordingly, the teaching assistant crossed a line, even taking "breathing space" and the broad nature of germaneness and relevance into consideration. See Donald A. Downs, *Academic Freedom: What It Is, What It Isn't*. Pope Center, 2009: http://www.popecenter.org/acrobat/AcademicFreedom.pdf.

32. AAUP, "Freedom in the Classroom," at 21 (emphasis added). For an example of a case in which a university properly decided that a teacher committed indoctrination, see Mary Lefkowitz, *History Lesson: A Race Odyssey* (Yale University Press, 2008).

33. Ortega, *Mission of the University*, edited and translated by Howard Lee Nostrand (Norton Library, 1966), 88-9.

34. Thomas Emerson, *The System of Freedom of Expression* (Random House, 1970).

35. The Supreme Court held that the removal of a book from a public school library raised more First Amendment problems than the decision not to acquire a book in the first place in *Board of Education v. Pico*, 457 U.S. 853 (1982).

36. As the Woodward Report makes clear, the rights of listeners are crucial to free speech values. Educational philosopher Alexander Meiklejohn has claimed that it is the core free speech right. *Free Speech and Its Relationship to Self-Government* (Harper Brothers, 1948).

37. Brandeis, concurring opinion in *Whitney v. California*, 274 U.S. 357 (1927), at 375-77.

38. See, e.g., *Christian Legal Society v. Martinez*, 561 U.S. 661 (2011): actual discriminatory conduct may lead to non-funding. On funding and "viewpoint neutrality," see *Board of Regents, University of Wisconsin System v. Southworth*, 529 U.S. 217 (2000). As First Amendment cases, *Martinez* and *Southworth* technically apply only to public schools, but similar principles are typically applicable to private schools as well, and are legally enforceable if contracts and policies so espouse.

39. *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

40. For more information see http://freeexpression.uchicago.edu/page/report-committee-freedom-expression.

41. Additionally, University of Chicago Professor Charles Lipson recently offered a list of five key institutional reforms that are worthy of consideration by academic leaders. His recommendations include expecting boards of trustees to demand the protection of free speech on their campuses; welcoming new students with acceptance letters and orientation activities that prepare them to engage in vigorous intellectual debate; assigning a senior administrator to ensure that campus debate is free and open; ensuring that student affairs offices respect principles of academic freedom; and being clear about the distinction between protest or challenge of ideas, and the shouting down or suppressing of ideas. See Charles Lipson, "The Death of Campus Free Speech – And How to Revive It," *Real Clear Politics*, June 28, 2016. http://www.realclearpolitics.com/articles/2016/06/28/the_death_of_campus_free_speech_--_and_how_to_revive_it_131029.html.

42. For a history of the University of Wisconsin Committee on Academic Freedom and Rights, founded by a co-author of this document, see http://www.csld.wisc.edu/history.htm.

43. Paul F. Campos, "The Real Reason College Tuition Costs So Much," *The New York Times* (April 4, 2015). https://www.nytimes.com/2015/04/05/opinion/sunday/.

the-real-reason-college-tuition-costs-so-much.html. For a rebuttal, see Matt Reed, "Dear New York Times," *Inside Higher Ed* (April 5, 2015). https://www.insidehighered.com/blogs/confessions-community-college-dean/dear-new-york-times.

44. Association of Governing Boards, *Statement on Governing Board Accountability for Campus Climate, Inclusion, and Civility* (2016), 9. http://agb.org/sites/default/files/agb-statements/statement_2016_campus_climate.pdf.

45. Association of Governing Boards, *Statement on the Fiduciary Duties of Governing Board Members* (2015). http://www.agb.org/statements/2015-07agb-board-of-directors-statement-on-the-fiduciary-duties-of-governing-board.

46. Daniel Kahneman, *Thinking, Fast and Slow* (Farrar, Straus, & Giroux, 2011), 52-8.

APPENDIX: CLASSIC AND CONTEMPORARY STATEMENTS ON CAMPUS SPEECH POLICIES

Below is a list of statements and reports which have helped to articulate and defend the right to free speech and open inquiry on campus.

The 1940 Statement of Principles on Academic Freedom and Tenure, American Association of University Professors 1940 (1970 revised)

Kalven Committee: Report on the University's Role in Political and Social Action, University of Chicago, 1967

The Woodward Report, Yale University 1974

FIRE's Guide to Free Speech on Campus, Foundation for Individual Rights in Education, 2005

Report of the Committee on Freedom of Expression, University of Chicago, 2014

And Campus for All: Diversity, Inclusion, and Freedom of Speech at U.S. Universities, Pen America, 2016

Association of Governing Boards Statement on Governing Board Accountability for Campus Climate, Inclusion, and Civility, 2016

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